EDITOR'S NOTE

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90-685

Case Number: _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

ROBERT N. ALDAY, individually and on behalf of all participants in the Container Corporation of America Salaried Retirees Health Insurance program as of December 31, 1986,

Petitioners,

vs.

CONTAINER CORPORATION OF AMERICA, THE JEFFERSON SMURFIT CORPORATION, and SMURFIT PENSION AND INSURANCE SERVICES COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOHN F. MacLENNAN
Counsel of Record
for Petitioners
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QUESTIONS PRESENTED

1. Did respondents have the right to unilaterally modify the ERISA plan for retiree health insurance based upon reservation of rights in the plan documents where pre-ERISA law would not have allowed such a modification.

2. Is a claim based on promissory estoppel available against an ERISA plan.

CERTIFICATE OF INTERESTED PARTIES

I hereby certify that:

1. The judges below were the Honorable John H. Moore, II, Honorable Paul H. Roney, Honorable Phyllis A. Kravitch and Honorable Ruggero J. Aldisert.

2. Appellants below, petitioners in this Court, are Robert N. Alday, et al.

3. Counsel for appellants below, petitioners in this Court, is John F. MacLennan, Kattman, Eshelman & MacLennan, P.A.

4. Appellees below, respondents in this Court, are Container Corporation of America, The Jefferson Smurfit Corporation, and Smurfit Pension and Insurance Company.

5. Counsel for appellees below, respondents in this Court, are Columbus R. Gangemi, Jr., Winston and Strawn, and William S. Burns, Jr., Marks, Gray, Conroy and Gibbs.

Respectfully submitted,

John F. MacLennan

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Attorneys for Petitioners

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CITES TO THE DISTRICT COURT AND UNITED STATES COURT OF APPEALS

The opinion of the United States District Court, Middle District of Florida, Case No. 87-488-Civ-J-16, is unpublished (1989). The opinion of the United States Court of Appeals, Eleventh Circuit, Case No. 89-3476, is reported at 906 F.2d 660. (1990).

STATEMENT OF GROUNDS ON WHICH JURISDICTION INVOKED

The final summary judgment by the trial court was entered on May 22, 1989. The affirmance by the United States Court of Appeals, Eleventh Circuit, was entered on July 24, 1990.

Petitioners are authorized to seek review of this matter by certiorari pursuant to 28 U.S.C. Section 1254.

STATEMENT OF THE CASE AND THE FACTS

This action was brought by plaintiff, Robert N. Alday, against defendants, Container Corporation of America, The Jefferson Smurfit Corporation, and Smurfit Pension and Insurance Company, alleging that the actions taken by defendants effective January 1, 1987 modifying the CCA Salaried Retiree Health Insurance program ("the Plan") were improper and should be set aside. Alday sought to represent a class consisting of all participants in the Plan as of December 31, 1986 with respect to the allegations in the complaint. The District Court, by order dated September 2, 1988, granted class action certification with respect to some but not all of the issues raised by the complaint.

Summary judgment was granted in favor of defendants by order and final judgment dated May 22, 1989. Alday timely appealed by notice on June 8, 1989. The Court of Appeals affirmed the District Court's judgment by order entered July 24, 1990. Petitioners' suggestion for rehearing en banc was denied by order dated September 19, 1990. Petitioners timely filed this petition for certiorari.

Jurisdiction in the trial court was granted by virtue of 28 U.S.C. Section 1331 and 29 U.S.C. 1001 et seq. Jurisdiction in the Court of Appeals was by virtue of 28 U.S.C. Section 1291.

ARGUMENT

I. THIS COURT SHOULD DETERMINE WHETHER RESPONDENTS HAD THE RIGHT UNILATERALLY TO MODIFY THE ERISA PLAN FOR RETIREE HEALTH INSURANCE BASED UPON RESERVATION OF RIGHTS IN THE PLAN DOCUMENTS WHERE PRE-ERISA LAW WOULD NOT HAVE ALLOWED SUCH A MODIFICATION.

In this action petitioner, Robert N. Alday ("Alday") brought suit on behalf of himself and all former salaried employees of Container Corporation of America, ("CCA"), who were as of December 31, 1986 participants in the program of group medical health insurance provided by CCA to its retired salaried employees ("the Plan"). Alday retired from CCA effective March 1, 1979 and from that

date forward has been a participant in the Plan.

CCA has provided its retired salaried employees with a program of group medical and health insurance for many years. In 1976, the program was improved and the participants were required to make a monthly contribution towards the cost of the Plan. At that time the contribution rate was set at $20.00 per month for each employee and spouse under the age of sixty-five and $8.00 per month for each employee and spouse age sixty-five and over. The reduced contribution rate for those sixty-five and over represented the effect of Medicare availability for those retirees at age sixty-five.

Effective January 1, 1987 the Plan was modified by respondent

Jefferson Smurfit ("JSC"). Specifically the benefits were reduced while the required monthly contributions were increased to $56.21 per month for the employee himself, $92.45 per month for dependent coverage, while those aged sixty-four and over were charged $54.81 per month for themselves and an additional $54.81 for dependent coverage.

The trial court entered summary judgment in favor of respondents holding that the respondents had the right to modify the Plan since the right to modify or terminate was set forth in the Plan document and summary plan descriptions.

Petitioners contend that this Court should determine whether such unilateral modifications to the Plan may

withstand scrutiny pursuant to ERISA, especially given this Court's landmark decision in Firestone Tire & Rubber Co., et al., v. Bruch, 109 S.Ct. 948 (1989).

In Bruch, the issue was what standard of review a court was to apply in reviewing an ERISA plan's denial of benefits to a participant. Until Bruch, the Federal Courts of Appeal had established the "arbitrary and capricious" standard as the proper one for reviewing benefit eligibility determination of plan fiduciaries. See, e.g., Wolfe v. J.C. Penney Co., Inc., 710 F.2d 388, 393 (7th Cir. 1983); Murn v. United Mine Workers of America, 718 F.2d 359 (10th Cir. 1985); Anderson v. Ciba-Geigy Corp., 759 F.2d 1518 (11th Cir. 1985), cert. denied 106 S.Ct. 410 (1985). Indeed of the special rules

established by the courts governing ERISA plans, this rule was the most clearly established.

In Bruch this Court unanimously rejected the arbitrary and capricious standard, holding that to apply such a standard in a denial of benefits context was contrary to the clear legislative purpose and history of ERISA and contrary to pre-ERISA law.

As this Court noted, ERISA is a "comprehensive statute designed to promote the interest of employees and their beneficiaries and employee plans". Shaw v. Delta Airlines, Inc., 463 U.S. 85, 90 (1983); Nachwalter v. Christie, 805 F.2d 956, 960 (11th Cir. 1986) ("a central goal of ERISA is to protect the interests of employees and their beneficiaries in employee benefit

plans"); Donovon v. Dillingham, 688 F.2d 1367, 1370 (11th Cir. 1982) (act intended "to protect working men and women from abuses in the administration ...of private...plans"); ERISA Section 2, 29 U.S.C. Section 1001 (Congressional findings and declaration of policy).

ERISA was enacted in 1974. One of ERISA's principal purposes is to assure "employees that they will not be deprived of their reasonably anticipated pension benefits". Amato v. Western Union International, Inc., 773 F.2d 1402, 1409 (2nd Cir. 1985), cert. dismissed, 107 S.Ct. 1167 (1986). Employers and plan administrators alike are specifically "prevented 'from pulling the rug out from under' employees and cutting off benefits that employees have relied upon." Id.

This Court in Bruch, noted the irony of the federal courts' justifying the adoption of a highly deferential standard of review to benefit denial cases based upon ERISA, where the clear legislative goal of ERISA was to benefit employees and participants and not to provide added protection for employers and plans.

Prior to ERISA, employee rights to retirement benefits were generally governed by state contract law. Hoefel v. Atlas Tack Corp., 581 F.2d 1 (1st Cir. 1978). In Hoefel, the plaintiff sought to recover pension benefits. The employer contended it had reserved the right to terminate or modify those benefits. The First Circuit held that the promise of a pension constitutes an offer which, upon performance of the

required service by the employee, becomes a binding obligation. As stated in Rochester Corp. v. Rochester, 450 F.2d 118,121 (4th Cir. 1971):

> "By rendering service for the period required under the plan, the employee's rights to benefits under the plan are earned no less than the salary paid to him (the employee) each pay period and are in the nature of delayed compensation for former years of faithful service. Whether the plan be contributory or non-contributory, the benefits thus earned are not gratuities."

The employer in Hoefel had reserved the right to change, suspend, or discontinue the plan at any time. However, the court concluded that reservation of right could not be used to deprive an employee who had rendered the required service of the promised retirement benefits.

In Rochester Corporation v. Rochester, 450 F.2d 118 (4th Cir. 1971),

a former employee sued to recover benefits under the former employer's pension plan. The court at page 120 noted that the pension plan provided that an employee who served ten years or more with the employer would upon obtaining retirement age be entitled to certain specified pension rights. The court noted that was a unilateral offer which when accepted by an employee (as shown by the employee serving ten years or more with the employer) became irrevocable. The court at footnote 4 at page 121 stated that pension plans were not a mere gratuity but a form of deferred compensation meant to influence the employees to continue working for the employer, thereby minimizing labor turnover. The court further noted that the pension plan drafted as it is by the

employer is to be construed liberally in favor of the employee.

In Cantor v. Berkshire Life Insurance Co., 171 N.E. 2d 518 at 5233 (S.Ct. Ohio 1960), the court stated:

> "Whether a plan in contributory or non-contributory and even though the employer has reserved the right to amend or terminate...once an employee has complied with all the conditions, his rights become vested and the employer cannot divest the employee of his rights thereunder."

In Sheehy v. Selion, Inc., 227 N.E. 2d 229 at 230 (S.Ct. Ohio 1967), the court held that once vested an employee may not be deprived of benefits "notwithstanding a proviso in the contract of employment to the contrary".

The same result was reached in Hoefel v. Atlas Tack Corp., 581 F.2d 1 (1st Cir. 1978). In that case the summary of the plan provided:

> "The company necessarily reserves the right to change, suspend or discontinue the plan at any time. No change, suspension or discontinuance will adversely affect the pensions already purchased unless a change is made in the plan for the purpose of meeting the requirements of the Federal Internal Revenue Code or any other applicable law."

The district court determined that the trend of modern authorities was that the establishment of the pension plan and the acts of the employees in qualifying for the pension under the plan constituted a contract and the employees' rights had become vested.

The court in Hoefel at page 5 cites decisions from New Jersey, Pennsylvania, Oregon, Ohio, Utah, Connecticut, and Missouri, all of which reach the same conclusion.

It should be noted that in Sheehy, supra, the court was dealing

with a claim by retired employees regarding health insurance. The Ohio Supreme Court citing its previous decision in Cantor, held that the right to such health insurance retiree benefits was a vested right once the employee retired.

Had the claims of petitioner arisen under pre-ERISA law, petitioner would have been entitled to recover as he and the other class members have without dispute rendered the service required by CCA. Further, respondents' own benefits specialist, Mr. Hal Fendius, admitted that deferred benefits such as the retiree health insurance program of CCA were used to maintain and employ a stable and productive workforce. As argued vigorously by petitioners below and adopted by this

Court in Bruch it is a strange result indeed where a statute (ERISA) enacted to protect the rights of employees and beneficiaries of employee welfare benefit plans is utilized by the courts to deny to those employees rights to benefits which would have been available to the claimants under pre-ERISA law.

Petitioners respectfully suggest that this Court should grant the writ in order to decide whether or not ERISA should properly be interpreted so as to take away from plan participants rights which they would have had under pre-ERISA law.

II. THIS COURT SHOULD GRANT THE WRIT IN ORDER TO RECONCILE CONFLICTING DECISIONS OF THE VARIOUS CIRCUITS REGARDING THE AVAILABILITY OF RELIEF AGAINST AN ERISA PLAN BASED UPON PROMISSORY ESTOPPEL.

As set forth below, the federal courts of appeals have split regarding whether or not promissory estoppel is available as a theory of recovery against an ERISA plan. Petitioners suggest this Court should grant the writ in order to clarify this very significant ERISA issue.

The Fifth Circuit in Woodford v. Marine Cooks and Stewards Union, 642 F.2d 966 (5th Cir. 1981) noted that 29 U.S.C. Section 1132(a)(1)(B) was intended to create a federal common law concerning benefit rights, which would

augment the rights created by ERISA's substantive provisions.

The Fifth Circuit went on to state:

> "We think in interpreting the terms of a pension plan...this federal common law allows a court to interpret a pension plan's terms in light of a worker's pre-ERISA state law rights."

Certainly the above language suggests promissory estoppel is an available theory in an ERISA context.

The Eighth Circuit has concluded squarely that a claim of promissory estoppel may be brought pursuant to ERISA. In Landro v. Glendenning Motorways, Inc., 625 F.2d 1344 (8th Cir. 1980), the court held that federal common law developed pursuant to ERISA would include a claim of promissory estoppel.

In O'Grady v. Firestone Tire & Rubber Co., 635 F.Supp. 81 (S.D.O. 1986)

estoppel under ERISA federal common law was available against an employer based on misrepresentations concerning health and welfare coverage.

In Terones v. Pacific State Steel Corp., 526 F.Supp. 1350 (N.D. Cal. 1981), the court held that the doctrine of estoppel is accepted in labor relations and pension benefits cases.

In addition to those courts which have held that estoppel is available in an ERISA context, several of the courts of appeals have held that promissory estoppel is a viable theory of recovery under 29 U.S.C. Section 185 of the National Labor Relations Act. In Apponi v. Sunshine Biscuit, Inc., 809 F.2d 1210 (6th Cir. 1987) the court held that promissory estoppel could arise in a Section 301 context, even where there

was no direct communication by the defendant to the plaintiff.

In Acri v. International Association of Machinists, 781 F.2d 1393 (9th Cir. 1986), the Ninth Circuit reversed the District Court's determination that promissory estoppel was not available in a suit against a union. The court expressly held at page 1397 that "promissory estoppel was not pre-empted by Section 301." The court stated that the elements of promissory estoppel would be found in the common law of contracts.

In Local Union 744 v. Metropolitan Distributors, 763 F.2d 300 (7th Cir. 1985), the court, while holding that the claim must be arbitrated, noted that waiver was an unavailable defense to be determined by

the arbitrator.

The Eighth Circuit has also noted that a federal common law is to be developed for ERISA claims comparable to that already developed for Section 301 claims. Anders v. John Morrell and Company, 830 F.2d 872 (8th Cir. 1987).

In another case involving the right to life and health insurance benefits in a Section 301 context, the Sixth Circuit held that the intent of the parties must be considered in determining the issue and evidence regarding a corporate officer's discussions with the employees just prior to their retirements was considered in determining that life and health insurance benefits would be for the lifetime of the retirees. International Union UAW v. Cadillac

Malleable Iron Co., 728 F.2d 807 (6th Cir. 1984).

In UAW v. Park-Ohio Industries, Inc., 661 F.Supp. 1281 (N.D.O. 1987), the court was dealing with the right to retiree health insurance in a Section 301 context. The court agreed with defendant's contention that plaintiff's state law claim of promissory estoppel was pre-empted. However, the court specifically held at page 1305 that the plaintiff may still proceed on a Section 301 promissory estoppel theory.

Contrary to the holdings of the courts discussed above, the courts of appeals for the Second, Sixth and Eleventh Circuits have rejected promissory estoppel claims in the ERISA context. Moore v. Metropolitan Life Insurance Co., 856 F.2d 488 (2nd Cir.

1988) and Musto v. American General Corp., 861 F.2d 897 (6th Cir. 1988) and Nachwalter v. Christie, 805 F.2d 956 (11th Cir. 1986). Those courts have held that where the ERISA plan contains the appropriate reservation of rights to modify or terminate language, a claim cannot be maintained based on alleged representations whether those representations are oral or in writing and regardless of the reliance on those representations by the employee/participants. While petitioners suggest these decisions are incorrect, they clearly demonstrate the conflict among the courts of appeals on this issue which this Court should resolve by granting the petition and determining this case on the merits.

CONCLUSION

This Court should grant this petition for certiorari and consider this case on the merits so that this Court can rule that ERISA should not be interpreted so as to take away from plan participant's rights to which they would have been entitled prior to the enactment of ERISA. Alternatively, this Court should grant the petition in order to reconcile the conflict among the federal courts of appeals regarding the viability of promissory estoppel in ERISA litigation.

For all the reasons stated above, petitioners respectfully request this Court grant the petition and consider the issues raised by the petition on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date I caused three copies of the foregoing Petition for Writ of Certiorari to be served on:

Columbus R. Gangemi, Jr.
One First National Plaza
Suite 5000
Chicago, Illinois 60603

and one copy to:

William S. Burns
800 Southeast Bank Building
Jacksonville, Florida 32207

by first-class mail, postage prepaid.

DATED this 14th day of October, 1990.

Kattman, Eshelman & MacLennan, P.A.
1920 San Marco Boulevard
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(904) 398-1229

By: _____
John F. MacLennan
Counsel for Petitioner

APPENDIX

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No.: 87-488-Civ-J-16

ROBERT N. ALDAY, individually and on behalf of all participants in the Container Corporation of America Salaried Health Insurance Program as of December 31, 1986,

Plaintiffs,

vs.

CONTAINER CORPORATION OF AMERICA, THE JEFFERSON SMURFIT CORPORATION, and SMURFIT PENSION AND INSURANCE COMPANY,

Defendants.

OPINION AND ORDER

This cause is before the Court on defendants' motion for summary judgment filed herein on December 21, 1988. Plaintiffs responded opposing said motion on January 17, 1989. After a thorough review of the pleadings,

memorandum and supporting exhibits the Court determines that defendants have demonstrated that they are entitled to summary judgment as a matter of law based on the facts on the record.

Plaintiff, Robert N. Alday, is a retired salaried employee of Container Corporation of America (CCA). He brought this action on behalf of himself and a proposed class of all similarly situated CCA salaried retirees who were participants of CCA's health insurance program (plan) as of December 31, 1986. Plaintiffs alleged that defendants violated the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Section 1001 et. seq., when they amended the terms of the health plan. The defendants are Container Corporation of America (CCA), the former employer of

the class and the sponsor of the plan; the Jefferson Smurfit Company, which currently owns 50% of the stock of CCA and exercises managerial control over CCA; and Smurfit Pension and Insurance Company, a subsidiary of the Jefferson Smurfit Company.

The undisputed facts are as follows. Defendant Container Corporation of America (CCA) has maintained a plan of health insurance for its salaried retired employees since 1964. In 1976, the plan was changed significantly. Under the new plan, retirees who elected to participate in it were required to pay for a portion of the cost of the program. In a letter announcing the new plan to all retirees, CCA informed the participants that their costs would be $8.00 a month for persons

with medicare and $20.00 a month for each person not eligible for medicare. The letter also stated that these costs could increase at a future date. The contribution rates remained unchanged until December 31, 1986.

The 1976 plan was set forth in a formal written document as required by ERISA. 29 U.S.C. Section 1102(a)(1). A summary of the terms of the plan called a "summary plan description" (SPD) was also prepared in accordance with the ERISA statute. 29 U.S.C. Section 1022. The SPD did not specify any particular dollar amounts for the premiums. The SPD also expressly provided that plan administrators reserved the right to "terminate, suspend, withdraw, amend or modify the plan in whole or part at any time, subject to any applicable

provisions of the group insurance policy(ies)..." 1976 SPD, pg. 24.

In the next ten years, the plan administrators modified the plan on several occasions. Each of the subsequent SPD booklets, including the 1986 SPD, contained the same right to terminate and amend language cited above. 1986 SPD, pg. 30. The 1986 SPD under a section entitled "When your insurance terminates" also stated the insurance ends if "this plan is discontinued". Pg. 19. As was true of the original 1976 SPD, none of the subsequent SPDs stated any set premium amount nor did they promise any particular allocation of burden or cost between the employer and the plan participants. The language of the 1986 SPD provided that "the employee's

contribution is a fixed monthly rate as determined from time to time". Pg. 29.

In 1977 or 1978, CCA began annually distributing a booklet entitled "Summary of Personal Benefits". This booklet set forth the various employee benefit plans offerd by CCA. With regard to health insurance available upon retirement, the Summary of Personal Benefits stated "[h]ealth insurance available to you and your dependents at a modest cost. Dental coverage ends." The booklet did not state any other details about the health benefit program nor did it say that CCA retained the right to terminate or modify the availability of health insurance to the retirees. However, the end of the summary did include language that this booklet only highlighted the

available programs and that these statements should be read in conjunction with the available plan descriptions for a full understanding of the plans. It also stated "[i]f there is any discrepancy between this report and the benefit to which you are actually entitled under any of the plans, the latter would, of course, govern."

In addition to the summary booklet, CCA had a policy that at the time a salaried employee neared retirement, a series of correspondence ensued between CCA and the employee. Included in this correspondence were form letters about the benefit options, enrollment cards to be filled out and returned by the retiree, and a copy of the current SPD. The SPD was not normally distributed to the employees before this

time. One of the standard form letters received by the retirees contained the following statement as to health insurance benefits:

> A plan of health insurance is available to you as a retiree through the company. The charge for this coverage is $20.00 per month, deductible from your monthly pension check. The health insurance plan is also available to your spouse at an additional cost of $20.00 per month if your spouse is not eligible for medicare.
>
> * * * *
>
> [after age 65]...a plan of health insurance benefits to supplement Medicare is also available through the company at a cost of $8.00 per month for you and $8.00 per month for your spouse.

The letter made no other representations as to the contents of the health insurance program. In all the correspondence between CCA and its retiring employees, the SPD was the only

document which stated that the health insurance benefits could be terminated or modified.

On January 1, 1987, CCA modified the benefits and raised the premiums of its retiree health insurance plan. These changes followed the sale of CCA to Jefferson Smurfit Corporation (JSC) and accompanying changeover in management and insurance carriers for CCA which have occurred in 1986. The CCA salaried retirees were advised that they would have to bear a considerably greater share of the cost of their medical insurance. Beginning January 1, 1987, CCA salaried retirees were charged a premium of $56.21 for themselves and $92.45 for dependent coverage, while over 65-year old retirees were charged $54.81 for themselves and $54.81 for

dependent coverage. The maximum lifetime benefits available under the plan were also reduced at this time.

In this lawsuit, plaintiffs assert that defendants' actions of substantially raising the plan's premiums and reducing benefits violated ERISA. In an Order dated September 2, 1988 pursuant to Rule 23 of the Federal Rules of Civil Procedure, this Court certified a class consisting of all CCA salaried retirees who were participants in the plan at the time of the changes. Based on the claims made in plaintiffs' complaint the Court certified for a class action the following two questions: (1) Whether defendants have the legal right to alter provisions of the plan pursuant to ERISA; and (2) whether defendants breached their

fiduciary duty owed to the plan participants "by failing to obtain for the participants the best possible plan of benefits at the lowest contribution rate by participants".

A class action was denied as to plaintiffs' third issue of whether the actions of the defendants in altering the provisions of the plan were in accord with the understanding of the participants in the plan as to their anticipated benefits and costs because the Court determined this question was not appropriate for a class action. In plaintiffs' amended complaint, the issue was redefined to whether defendants' actions in altering the plan were in accord with the participants' understanding that "the plan would be perpetually maintained as a benefit on

the same basis and at the same rate at which it was available at the time of their retirement. They further understood that they became vested in this plan upon retirement". A motion to amend the class certification as to this third issue based on the new assertions in this issue was denied by this Court on March 1, 1989. Therefore, this issue will be adjudicated only to Mr. Alday on an individual basis.

CONCLUSIONS OF LAWS

This cause is brought under 29 U.S.C. Section 1001, et. seq. This Court has jurisdiction pursuant of 28 U.S.C. Section 1331.

The first issue the Court will consider is whether the defendants had the legal right under ERISA to amend the plan as they did in this instance. A

retiree health insurance plan, such as the one provided by CCA, is a welfare benefit plan as defined by ERISA. 29 U.S.C., Section 1002 (1). CCA's retiree health plan, however, does not qualify as a pension plan as defined by the statute. 29 U.S.C. Section 1002 (2). It is only pension plans and not welfare benefit plans that are subject to ERISA's vesting, participation, and minimum funding requirements. 29 U.S.C., Section 1051 et seq., and Section 1081 et seq. and Anderson v. Alpha Portland Industries, Inc., 836 F.2d 1512 (8th Cir. 1988). Since CCA's plan is not subject to ERISA's vesting requirements, these provisions do not apply in determining the legality of defendants' actions in amending their plan. Therefore, plaintiffs cannot

argue that they had vested rights to the defendants' health benefit plan under ERISA. See id. and Moore v. Metropolitan Life Insurance Co., 856 F.2d 488 (2nd Cir. 1988).

The Court notes that the plaintiffs do not allege that any specific provision of ERISA was violated by the defendants. In the absence of a violation of any specific provision of ERISA, the Court looks to the plan itself to determine whether it comports with the requirements of ERISA and whether the defendants breached any of the plan's terms. CCA's plan was in writing and including a plan summary, the SPD, as required by ERISA. The 1986 SPD, as did all previous SPDs, had a provision which expressly reserved the right to "terminate, suspend, withdraw,

amend, or modify the plan." The Court finds that this clause is clear and unambiguous and therefore, the Court should not consider parol evidence as to its meaning. Therefore, since CCA specifically reserved the right to amend the plan, the Court concludes defendants had the right to the premiums and benefits of their plan.

In making this conclusion, the court is rejecting plaintiffs' contention that the Court should consider all the communications between CCA and its plan beneficiaries in determining what contract or plan agreement existed between the parties. The Court finds that the reasoning of the Second Circuit in a similar ERISA class action suit is persuasive in finding that the congressional intent

behind ERISA would be seriously undermined if a court looked beyond the plan and SPD's language in defining the employer's obligation under a plan. Metropolitan Life Insur. Co., supra, at 492. Since plaintiff made no allegation of fraud on the part of the defendants, the Court determines that there is no reason to look beyond the plain unambiguous language of the SPD in interpreting the plan. [1] Id. The Eleventh Circuit has held that the terms of an employee benefit plan may not be

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1 Alternatively, if the Court did consider the statements quoted above in the summary of personal benefit benefits, the Court finds that these statements would not alter its determination as to defendant's obligation under the plan.

modified by oral agreements under ERISA and therefore, the Court did not consider any oral communications between CCA and the plan beneficiaries in determining the defendants' duties under the plan. Nachwalter v. Christie, 805 F.2d 956 (11th Cir. 1986).

The plaintiffs' second claim is that defendants breached their fiduciary duty to the plaintiffs "by failing to obtain for the plan participants the best possible plan of benefits at the lowest contribution rate by participants." The ERISA statute does impose certain standards of conduct upon fiduciaries of both pension and welfare benefit plans. These fiduciary duties however, only apply when the employer is acting in his position as an administrator of a plan. If the

employer is acting in his capacity as a "settlor" of the plan, then his conduct as to business decisions in implementing the plan are not regulated by the fiduciary duties mandated in the ERISA statute. Musto v. American General Corporation, 861 F.2d 897 (6th Cir. 1988); Amato v. Western Union International, Inc., 773 F.2d 1402, 1416 (2nd Cir. 1985) and see Phillips v. Amoco Oil Co., 799 F.2d 1464, 1471 (11th Cir. 1986). Caselaw has consistently distinguished these two roles of the employer because the purpose behind ERISA is to control the elements and administration of the plan but not to mandate how and under what terms an employer should provide benefits. Musto, 861 F.2d at 912.

In this case, the Court finds

that the defendants' decision to amend the plan and increase the premiums was a business decision effected in defendants' capacity as "settlor" of the plan. Since the defendants were acting in their role as a plan "settlor" rather than as a fiduciary administering the terms of the plan, the Court concludes that defendants owed no fiduciary duty to the plaintiffs to provide the "best possible plan of benefits at the lowest possible contribution rate." In making this determination, the Court notes that the employer has no affirmative duty to provide any plan of insurance to its employees, much less a duty to provide a plan which give certain particular benefits at certain particular costs. See Moore v. Reynolds Metals Co. Retirement Program for Salaried

Employee, 740 F.2d 454, 456 (6th Cir. 1984). The decision on what benefits to provide in a plan is a business decision which is not subject to review by the courts on a fiduciary standard under ERISA. Id.

The third claim, which this Court is addressing only to Mr. Alday in his individual capacity, asserts that defendant's action in modifying the plan was not in accord with his understanding that the plan would be perpetually maintained as a benefit on the same basis and at the same rate at which it was available at the time of his retirement and that he further understood that he became vested in this plan upon retirement. In essence, Mr. Alday is making a promissory estoppel argument against the defendants.

The Court determines that a promissory estoppel argument is not available to the plaintiff under ERISA. In Nachwalter v. Christie, supra, the Eleventh Circuit, after first recognizing that state common law claims such as estoppel are preempted by ERISA, held that it would not create a federal common law right of estoppel under ERISA. The Nachwalter court reasoned that creation of a federal common law right was not necessary because the ERISA statute provided a clear, complete and fully integrated statutory scheme for the establishment of benefit plan terms. Id., 805 F.2d at 960. Although Nachwalter dealt specifically with oral representations rather than written ones as is the situation in the instance case, the Nachwalter Court acknowledged

that Congress had prohibited informal written amendments to ERISA plans and prohibition was a factor in their determination that oral modifications should also be precluded. Id. and 29 U.S.C. Section 1102(a) and (b). Two other Circuits have also held in similar actions that promissory estoppel arguments are not available under ERISA because the statute requires the plan be established and maintained in a written document. Metropolitan Life Insurance Co., supra, and Musto, supra,. Thus, the Court concludes that Mr. Alday cannot maintain an action against defendants on a theory that defendants modified their plan in a manner which was contrary to his understanding of the nature of the benefits.

In accordance with the above

discussion the Court determines that defendants are entitled to summary judgment as matter of law in the cause based on the facts in the record. Accordingly, it is now:

ORDERED AND ADJUDGED:

That defendants' Motion for Summary Judgment be and the same is hereby **GRANTED** and the Clerk of the Court is hereby directed to enter final judgment in this cause for the defendants.

DONE AND ORDERED in Chambers in Jacksonville, Florida, this 22nd day of May, 1989.

/s/ John H. Moore, II.
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Robert N. ALDAY, Individually, and on behalf of all participants in the Container Corp. of America Salaried Retiree Health Insurance Program as of December 31, 1989, Plaintiffs-Appellants.

v.

CONTAINER CORPORATION OF AMERICA, The Jefferson Smurfit Corporation, Smurfit Pension and Insurance Co., Defendants-Appellees.

No. 89-3476

Appeal form the United States District Court for the Middle District of Florida.

Before KRAVITCH, Circuit Judge, RONEY*, and ALDISERT**, Senior Circuit Judges.

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*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable Ruggero J. Aldisert, Senior U.S. Circuit Judge for the Third Circuit, sitting by designation.

July 24, 1990

KRAVITCH, Circuit Judge:

Plaintiff Robert N. Alday, individually and as the representative of a class of approximately one thousand participants in a retiree health insurance program, brought suit against the Container Corporation of America ("CCA"), the Jefferson Smurfit Corporation ("JSC"), and Smurfit Pension and Insurance Company ("SPI").[1] Alday challenged CCA's decision, effective January 1, 1987, to modify the benefits and premiums of CCA's salaried retiree medical insurance plan on the grounds that such modifications were improper

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1. JSC, which currently owns 50% of CCA's stock, exercises managerial control over CCA, including management of the company's employee benefits. SPI provides consulting services to Jefferson Smurfit of which it is a subsidiary.

and should be set aside. The district court, after certifying only certain of Alday's claims for the class, granted summary judgment in favor of the defendants. Alday appeals the denial of class certification on one of his claims and the district court's grant of summary judgment.

BACKGROUND

CCA has maintained a health insurance plan for retired employees since 1964. In 1976, that plan was changed significantly. The plan's benefits were increased and employees who elected to participate were required to pay for some of the plan's cost.

In accordance with the requirements of the Employee Retirement Income Security Act, 29 U.S.C. Section 1001 et seq. ("ERISA"), the terms of the 1976

plan were described in a formal written document and were communicated to employees by means of a document called a "summary plan description" (SPD").[2] A participating employee's monthly contributions to the plan began upon retirement. The plan documents did not specify a dollar amount for the employee's contributions, but stated instead in the Schedule of Benefits that

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2. 29 U.S.C. Section 1002(a)(1) states in part that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument." 29 U.S.C. Section 1002 provides that "[a] summary plan description shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title." Apparently, CCA's formal written document and the SPD were identical.

contributions would be "as required by the plan". [3] In addition, the plan documents also expressly provided that plan administrators reserved the right to "terminate, suspend, withdraw, amend or modify the Plan in whole or in part at any time."

When the plan went into effect in 1976, employees were informed by a letter from the chief executive that participants were required to contribute $20 per month for each employee and spouse under the age of 65 and $8 per month for each employee and spouse age

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3. Later SPD's, such as the 1979 SPD, provided that "[t]he health insurance under this plan is on a contributory basis requiring contributions from you towards its costs." The 1986 SPD also provided that "[t]he Employee's contribution is a fixed monthly rate as determined from time to time."

65 and over.[4] The initial letter describing the program noted that these costs could increase at a future date, and that in the event of a cost increase, employees had the option of continuing at the new cost of canceling their coverage.

Subsequently, the plan was modified several time in minor ways. Each modification was described in a revised SPD, which also included the language pertaining to the right to modify or terminate quoted above. The SPD's were not generally distributed to

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4. The lower monthly contributions for retired employees age 65 and older reflects the fact that such employees are also eligible for benefits under Medicare.

employees prior to their retirement,[5] although both sides agree that SPD's were available upon request.

Beginning in 1977, CCA distributed annually to employees a booklet entitled "Summary of Personal Benefits", which set forth the various employee benefit plans offered by CCA, and provided an individualized calculation of the pension and stock bonus plan accruals earned by the employee to date. Under the heading "Health and Dental Plans", the booklet stated that upon retirement "[h]ealth insurance [is] available to you and your dependents at a modest cost. Dental coverage ends." The

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5. According to an affidavit of Harold F. Fendius, former Manager of Employee Benefits Planning at CCA, the SPD's were normally sent to CCA employees around the time of their retirement date, accompanied by an enrollment card.

booklet did not set forth any other details about the health benefit program, nor did it state that CCA retained the right to terminate or modify the health insurance available to the retiree. The booklet did note, however, that any discrepancy between its contents and those of the formal plan documents would be governed by the terms of the plan documents.

When an employee neared retirement, pre-retirement planning seminars were held and a series of correspondence ensued between CCA and the employee. Included in this correspondence were form letters about the benefit options, enrollment cards, and a copy of the current SPD. One of the form letters stated the amount that retired employees were required to contribute for health

insurance coverage. The form letters did not state that the health insurance benefits could be terminated or modified. The written materials accompanying the planning seminars also made no statements regarding CCA's right to terminate or modify coverage.

On January 1, 1987, CCA modified the benefits and substantially raised the employee contributions of its retiree health insurance plan.[6] Beginning on that date, CCA salaried retirees under age 65 were required to contribute $56.21 for themselves and $92.45 for dependent coverage, while retirees age 65 and older were charged $54.81 for themselves and $54.81 for dependents.

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6. These changes followed the sale of CCA to Jefferson Smurfit Corporation and the accompanying changeover in CCA's management.

The maximum lifetime benefits available under the plan were also reduced at that time.

Alday brought this action on behalf of himself and all similarly situated employees [7] against CCA, its parent company JSC, and its pension consultant SPI. Alday and the class alleged that the modification of the plan in 1987 violated ERISA and breached the defendants' fiduciary duty to the plaintiffs. Alday also alleged that the defendants were estopped from altering the terms of the plan because they had induced him into believing that the plan's terms would not change, and he relied upon that representation. The

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7. The class was composed of all CCA retirees who were participating in the plan prior to the 1987 modifications.

court refused to certify the promissory estoppel issue for the class, finding that it did not satisfy the requirements of Fed.R.Civ.P. 23(a). After the district court granted summary judgment for the defendants on all claims, this appeal ensued.

I.

[1] Alday puts forth several arguments as to why the district court erred in granting summary judgment for the defendant on his claim that the January 1, 1987 modifications to the plan were not permissible under ERISA. One argument Alday cannot make is that regardless of the plan's language, he had vested rights to the defendants' health insurance plan under ERISA. This

argument is foreclosed by the fact that the retiree health insurance plan is a welfare benefit plan under 29 U.S.C. Section 1002(1) and not a pension plan under 29 U.S.C. Section 1002(2). Pension plans are strictly regulated by ERISA and are subject to ERISA's vesting, participation, and minimum funding requirements. Welfare benefit plans, which are benefits such as medical insurance that may be ancillary to but are not part of a pension plan, are not subject to these requirements.

See 29 U.S.C. Section 1051 et seq. & Section 1081 et seq.[8]

[2] Instead of arguing that ERISA mandates the vesting of his welfare benefits, Alday argues that under pre-ERISA law, a retired employee's rights to health benefits were vested at the time of retirement, and that the right

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8. In Moore v. Metropolitan Life Ins. Co., 856 F.2d 488 (2d Cir. 1988), the Second Circuit noted that:

With regard to an employer's right to change medical plans, Congress evidenced its recognition of the need for flexibility in rejecting the automatic vesting of welfare plans. Automatic vesting was rejected because the costs of such plans are subject to fluctuating and unpredictable variables. Actuarial decisions concerning fixed annuities are based on fairly stable data, and vesting is appropriate. In contrast, medical insurance must take account of inflation, changes in medical practice and technology and increases in the costs of treatment depending on inflation. These unstable variables prevent accurate predictions of future needs and costs. Id. at 492.

reserved by CCA in the plan documents to modify or terminate the plan cannot be applied to affect his rights. His main argument is that the Supreme Court's decision in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989) effectively overrules all decisions which interpret ERISA to provide less protection to retirees than would have been available to them under the pre-ERISA common law jurisprudence on pensions.

We conclude that Alday's reading of Bruch is erroneous, and that the case has no bearing on the facts before us. In Bruch, the question before the Court was the appropriate standard to be used by courts of appeals in reviewing actions under 29 U.S.C. Section

1132(a)(1)(B) challenging denials of benefits based on plan interpretations. The Supreme Court rejected the "arbitrary and capricious" standard of review used by the majority of the courts of appeals and held that a denial of benefits is to be reviewed by appellate courts de novo.[9] In reaching this result, the Court noted that ERISA served to make applicable to fiduciaries administering benefit plans certain principles developed in the law of trust. It found that "[t]he trust law de novo standard of review is consistent with the judicial interpretation of employee benefit plans prior to the enactment of ERISA". 489 U.S. at ----,

9. The Court made clear, however, that de novo review is not required in cases where "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." 489 U.S. at ---, 109 S.Ct. at 956.

109 S.Ct. at 955. The Court reasoned that because "ERISA was enacted to promote the interests of employees and beneficiaries in employee benefit plans,' and 'to protect contractually defined benefits'" id. (citations omitted), it would be anomalous to apply a standard of review that would afford "less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted". Id. 109 S.Ct. at 956.

Alday seizes upon the Supreme Court's reasoning in Bruch to support his contention that ERISA can never be construed in a manner that would provide less protection to employees than they would receive under common law. He states that had the claims he presents arisen under pre-ERISA law, he would

have been entitled to recover, as he and the other class members had rendered the services required by CCA and were therefore entitled to the vesting of medical benefits with unchangeable employee contributions.

It is unnecessary for us to decide whether Alday would have been entitled to recover under pre-ERISA law,[10] because

10. Alday has provided little support for the proposition that under pre-ERISA law, CCA would have been prohibited from modifying the terms of the retirees health insurance plan. Alday cites to several pre-ERISA cases in which the court have held that once an employee has complied with the conditions of employment, his pension rights become vested, and the employer of this rights notwithstanding a proviso in the contract of employment to the contrary. See, e.g. Rochester Corp. v. Rochester, 450 F.2d 118 (4th Cir. 1971); Hoefel v. Atlas Tack Corp., 581 F.2d 1 (1st Cir. 1978), cert. denied, 440 U.S. 913, 99 S.Ct. 1227, 59 L.Ed.2d 462 (1979). Of the cases cited, however, only one, Sheehy v. Seilon, Inc., 10 Ohio St.2d 242, 227, N.E. 2d 229, 230 (1967) involved a claim by retired employees regarding health insurance. The others

we find that Bruch in no way mandates such an inquiry. It is clear that ERISA pre-empts state common law causes of action relating to benefit plans,[11] and in many respects, ERISA purposefully displaced the common law by imposing express requirements on employers and pension plans.[12] While Bruch suggests that the ERISA policy of protecting plan beneficiaries should be considered when evaluating claims that are not addressed by the explicit language of the statute, the opinion in no way invalidates

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10. (cont'd.) involved pension plans, which, even under ERISA, are subject to vesting requirements.

11. See 29 U.S.C. Section 1144(a); Phillips v. Amoco Oil Co., 799 F.2d 1464, 1470 (11th Cir. 1986), cert. denied, 481 U.S. 1016, 107 S.Ct. 1893, 95 L.Ed.2d 500 (1987.)

12. One such requirement is that the terms of a plan be contained in a formal written document and an SPD. See 29 U.S.C. Section 1002(a)1).

welfare benefit plans that comport with ERISA's requirements, but reserve certain rights to the plan fiduciary.

II.

[3] In addition to his broad attack on the validity of the plan on the basis of Bruch, Alday also claims that in reviewing the terms of the plan itself, the district court erred in refusing to consider communications between CCA and it employees other than the formal plan documents. As noted above, ERISA requires that welfare benefit plans be governed by written plan documents which are to be prepared and filed in compliance with ERISA's reporting and disclosure requirements. The SPD is the statutorily established means of informing participants of the terms of the plan and its benefits. See 29

U.S.C. Section 1022(a) & 1102; 29 C.F.R. Section 2520.102-2. Accordingly, any retiree's right to lifetime medical benefits at a particular cost can only be found if it is established by contract under the terms of the ERISA-governed benefit plan document. See Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988). Here, the SPD clearly provides that the retiree health insurance plan may be terminated or modified. No basis can be found in the language of the plan documents to contradict CCA's reservation of the right to amend or even terminate the plan at any time.

[4] Alday does not argue that the language of the SPD is ambiguous, but claims that certain communications between CCA and its employees

contradicted that language and that those communications are controlling. In particular, he points to the Summary of Personal Benefits booklet, letters sent to employees nearing retirement, and documents accompanying retirement seminars. None of these communications informed employees of CCA's right to terminate or discontinue the plan.

In Nachwalter v. Christie, this court stated that oral representations or promises cannot modify the clear terms of an employee benefit plan. 805 F.2d 956 (11th Cir. 1986).[13] Although

13. In addition to the Eleventh Circuit, the Second, Fifth, Sixth and Seventh Circuits have also concluded that ERISA precludes oral modification or benefit plans. See Moore, 856 F.2d 488; Cefalu v. B.F. Goodrich Co., 871 F.2d 1290, 1295-97 (5th Cir. 1989); Musto v. American General Corp., 861 F.2d 897 (6th Cir. 1988), cert. denied,--U.S.--, 109 S.Ct. 1745, 104 L.Ed.Wd 182 (1989); Central States, S.E. & S.W. v. Gerber Truck Service, Inc., 870 F.2d 1148, 1149 (7th Cir. 1989).

Nachwalter involved only oral representations, the court based its holding on the fact that Congress expressly prohibited informal written amendments of ERISA plans under 29 U.S.C. Section 1102(b)(3). The court stated that:

> ERISA requires that each plan shall "provide a procedure for amending such a plan, and for identifying the persons who have the authority to amend the plan." 29 U.S.C. Section 1002(b)3). By explicitly requiring that each plan specify the amendment procedures, Congress rejected the use of informal written agreements to modify an ERISA plan.

Id. at 960.

Our holding in Nachwalter is

controlling in this case and Alday's attempts to distinguish that decision are unavailing. Alday first argues that this situation is different from that presented in Nachwalter because the Summary of Personal Benefits booklet distributed to CCA employees was not an "informal" communication but was instead an "official document". In fact, Alday states that this document is sufficiently formal to be construed as a "plan document". It is clear, however, that the booklet does not fulfill the requirements for plan descriptions and summary plan descriptions asset out at 29 U.S.C. Section 1022. The booklet does not describe the plan's terms, specify its benefits or coverage, or define eligibility requirements or limitations. It fails to give plan

participants any of the information they would need in order to participate in CCA's program for retiree health insurance.[14] The pre-retirement letters likewise do not in any way constitute plan documents.

Alday points to cases in which the courts have found documents other than the SPD to constitute ERISA plan documents, see In re White Farm Equipment Co., 788 F.2d 1186, 1193

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14. Alday points to Kochendorger v. Rockdale Sash & Trim Co., 653 F.Supp. 612 (N.D.Ill. 1987) for the proposition that "any document a plan distributes to plan participants which contains all or substantially all of the information the average participant would deem crucial to a knowledgeable understanding of his benefits under the plan shall be deemed a summary plan description." Id. at 615. Without endorsing the holding in Kochendorfer, we note that the passing reference to retiree health insurance in CCA's booklet as "available to you and your dependents at a modest cost" hardly reaches the level of specificity required by the Kochendorfer court.

(6th Cir. 1986); Eardman v. Bethlehem Steel Corp. Employee Welfare Benefit Plans, 607 F.Supp. 196 (W.D.N.Y. 1984); Myron v. Trust Company Bank Long Term Disability Benefit Plan, 522 F.Supp. 511, 516-18 (N.D. Ga. 1981), aff'd, 691 F.2d 510 (11th Cir. 1982), cert. denied, 462 U.S. 1119, 103 S.Ct. 3086, 77 L.Ed.2d 1348 (1983), and cases in which courts have looked to documents other than the ERISA plan documents to determine the intentions of the parties. See Bower v. Bunker Hill Company, 725 F.2d 1221, 1224 (9th Cir. 1984); Myron, 522 F.Supp. at 519. These cases are easily distinguishable from the instant case. In White Farm and Myron, there are either no SPD or formal plan document, or there was confusion as to what documents constituted the plan. In

Bower and Eardman, the formal plan documents did not unambiguously reserve the right to terminate or modify the plan.

Here, in contrast, there was an SPD which clearly functioned as the plan document required by ERISA. Moreover, the SPD unambiguously set out the rights of the parties, including CCA's right to terminate or modify the plan. Accordingly, there is not need to refer to other communications between the parties to determine the parties' intent. Thus, under Nachwalter, the terms of the SPD are controlling and other documents must be ignored.[15]

15. We note that our holding does not insulate from liability a fiduciary who makes fraudulent promises in informal communications that deceive employees and contradict the terms of the SPD. In such a case, there may be valid reasons for a court to look beyond the unambiguous language of the SPD in

III.

[5] Alday asserts that the district court's entry of summary judgment on his theory of promissory estoppel was error. In Nachwalter, after recognizing that state common law claims such as estoppel are preempted by ERISA, the Eleventh Circuit explicitly held that there was no federal common law right to promissory estoppel under ERISA in cases involving oral amendments to or modifications of employee plans governed by ERISA because ERISA specifically addresses these issues. 805 F.2d at 960.

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15. cont'd. interpreting the plan.

Here, Alday makes no allegations of fraud on the part of CCA. Moreover, none of the documents relied on by Alday in any way contradict the SPD, but merely fail to include language concerning CCA's right to modify or terminate the plan.

In Kane v. Aetna Life Ins., 893 F.2d 1283 (11th Cir. 1990), this court further clarified the scope of the holding in Nachwalter. In Kane, the court differentiated between oral amendments or modifications to a plan and oral interpretations of a plan. It held that the federal common law claim of equitable estoppel may be applied where (a) the provisions of the plan at issue are ambiguous such that reasonable persons could disagree as to their meaning or effect, and (b) representations are made to the employee involving an oral interpretation of the plan. Id. at 1286-87. Despite Alday's assertions to the contrary, we find that the holding in Kane has no bearing on the case before us. First, Kane only comes into play when the terms of a plan are

ambiguous. In addition, equitable estoppel may only be used where the communications constituted an interpretation of that ambiguity. As neither of these prerequisites existed in the instant case, Nachwalter remains controlling and precludes a plan challenge premised on estoppel.

IV.

Alday's final claim is that the trial court erred in denying class certification on this estoppel claim. Having determined that a promissory estoppel theory is not available to Alday, it is immaterial that the other employees were not joined in the class. Accordingly, the order denying class certification is AFFIRMED.

Because we find that there are no material facts in dispute and that the

district court correctly applied the law to the facts in the record, the district court's order granting summary judgment in favor of the defendants is AFFIRMED.

(2)

No. 90-685

In the

Supreme Court of the United States

October Term, 1990

ROBERT N. ALDAY, individually and on behalf
of all participants in the Container Corporation of America
Salaried Retiree Health Insurance program
as of December 31, 1986,
Petitioner,

v.

CONTAINER CORPORATION OF AMERICA,
THE JEFFERSON SMURFIT CORPORATION,
and SMURFIT PENSION AND INSURANCE SERVICES COMPANY,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1) Whether *Firestone Tire & Rubber Co. v. Bruch*, ___ U.S. ___, 109 S. Ct. 948 (1989), requires reversal of the decision in this case, as allegedly contrary to pre-ERISA law.

2) Whether promissory estoppel is available at federal common law to alter the terms of clear and unambiguous formal plan documents which, under ERISA, can only be created, maintained and amended in writing.

3) Whether Petitioner has stated a claim for promissory estoppel under the undisputed facts of this case.

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Circuit Court of Appeals:

Alday et al. v. Container Corporation of America et al., 906 F.2d 660 (11th Cir. 1990)

STATEMENT OF THE CASE

(i) Course of Proceedings and Dispositions Below:

This action was brought by Petitioner, Robert N. Alday, a salaried retiree and former plant general manager of Container Corporation of America ("CCA"), against Respondents, CCA, Jefferson Smurfit Corporation ("JSC"), and Smurfit Pension and Insurance Services Company ("Smurfit Pension"),[1] alleging that the actions taken by Respondents, effective January 1, 1987, modifying the benefits and premiums of the CCA salaried retiree medical insurance plan ("Plan") were improper and should be set aside. R1-1. Petitioner brought this action on behalf of himself and a proposed class consisting of all CCA salaried retirees who were participating in the Plan at the time of the changes, i.e, prior to January 1, 1987. R1-1. By order dated September 2, 1988, the district court certified for class treatment two of the three alleged common issues raised in paragraph 7 of the Complaint. R2-52.[2]

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1 In accordance with this Court's Rules 24.1(b) and 29.1, Respondents state that the parties to the proceeding in the Eleventh Circuit are those in the caption of the case in this Court. Respondents further state that Smurfit Newsprint Corporation is a non-wholly owned subsidiary of Jefferson Smurfit Corporation. The parents of Jefferson Smurfit Corporation are Jefferson Smurfit Group plc, an Irish company, and The Morgan Stanley Leveraged Equity Fund, II, L.P.

2 The court held that the third issue raised by Petitioner in his original Complaint - whether the plan modifications were contrary to certain understandings or beliefs held by himself and the proposed class members - was not appropriate for class action treatment. R2-52-6. Subsequent to the issuance of the court's order, but apparently prior to its receipt, Petitioner added a new

Summary judgment was granted in favor of Respondents by order and final judgment dated May 22, 1989. R5-110, R5-111. Petitioner appealed this decision to the Eleventh Circuit. On July 24, 1990, the Eleventh Circuit affirmed the district court's order granting summary judgment in favor of Respondents. A petition for rehearing was denied by the Eleventh Circuit on September 19, 1990.

(ii) Statement of the Facts

While the Statement of Facts submitted by Petitioner is not inaccurate, it is substantially incomplete. The courts below in significant part predicated their resolution of the legal issues presented on the unique facts out of which this case arose. Accordingly, to enable this Court to evaluate properly the instant Petition, Respondents supplement the facts as follows:

In 1964, CCA unilaterally established a program of medical insurance for its retirees. Originally, the plan covered all CCA retirees but provided only certain scheduled benefits. For example, the maximum hospital daily benefit was only $12.00 and the maximum surgical expense benefit was only $200.00. R3-67 - Ex. 1A at 7. The old 1964 insurance plan booklet distributed to eligible retirees expressly informed them that the plan "benefits will be provided to eligible retired employees without cost to them." *Id.* Dependent coverage was made

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Count II to his Complaint in which he alleged that Respondents were estopped from altering the terms of the Plan in a manner contrary to these understandings. R3-54 - 11,12. The new Count II is equivalent to the one which the court had already determined to be individual in nature, because it is based on the same alleged expectations of plan participants derived from unspecified representations which the court had already held lacked commonality. R2-52-6.

available at a "nominal" cost of $6.83 per month. Notably, that dependent premium amount was expressly set forth in the plan booklet.

Furthermore, the 1964 plan contained *no* express termination provision stating that it could be cancelled, modified, or amended at any time.[3]

CCA made no significant changes to this program until 1976. At that time a much more comprehensive and otherwise considerably different program of retiree health benefits was announced by CCA. Again, this new benefit program was unilaterally instituted by CCA management. R3-67 - Ex. 1 at 2. This new CCA salaried retiree medical insurance plan, however, differed from the first one in that, for the first time, retirees who elected coverage under the Plan were required to pay for part of the cost of their own coverage, as well as for the coverage of their eligible dependents. The new Plan was announced by a letter and attached "Highlights" memorandum to all retirees,[4] from then Chairman and Chief Executive Officer Henry Van der Eb. The retiree costs announced by Van der Eb in 1975 were as follows:

	Each Person Not Eligible Under Medicare (-65)	**Each Person Eligible Under Medicare (65+)**
Monthly Contributions	$20.00 (individual) $20.00 (dependent)	$8.00 (individual) $8.00 (dependent)

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3 As a consequence, when this plan was replaced in 1976, retirees were given the option of keeping this old plan, although, to our knowledge, only a few did so.

4 This letter and memorandum were apparently also sent to all the active CCA managers, such as Petitioner Alday, and the memorandum or later updated versions of it were sent thereafter to prospective retirees. R5-105-37 to 42, Ex. 20; R5-107-44 to 45.

The Highlights memorandum also stated that:

> There is every expectation that your contribution and the Company's contributions will be adequate to cover the long term cost of the Plan. However, contributions are based on the Plan's expected costs and may change in the future. In the event the cost does increase at some future date, you will, of course, have the choice of continuing in the Plan at the new cost or cancelling your coverage.

R3-67 - Ex. 1B.

With the passage of the Employee Retirement Income Security Act ("ERISA") in 1974, all welfare benefit plans were required to be in writing. 29 U.S.C. § 1102(a)(1)(1982). Although ERISA recognized that every employee could not be given the often lengthy formal plan document, it required that the terms of the plans be communicated to employees by means of documents called "summary plan descriptions" ("SPDs"). The new CCA plan's descriptive booklet, or SPD, differed from the booklets for the old plan issued from 1964 through 1976 in several key respects. First, the new SPD did *not* specify any particular retiree or dependent premium dollar amounts. Rather, the Schedule of Benefits provided only:

> "III. Contribution - as required by the Plan."

R3-67 - Ex. 1D at 4.

Second, the SPD for this new Plan also expressly provided that CCA could modify or terminate the Plan in the future. Thus, the section "*When Your Insurance Terminates*" stated:

> Your insurance under this plan will terminate at the earliest time stated below:
>
> 1. When you cease to be a Retired Employee (as defined).
>
> 2. When this Plan is discontinued ...

R3-67 - Ex. 1D at 18. Likewise, paragraph 7, entitled "*Plan Termination,*" provided:

> The right is reserved in the Plan for the Plan Administrator to terminate, suspend, withdraw, amend or modify the Plan in whole or in part at any time, subject to the applicable provisions of the group insurance policy(ies).

R3-67 - Ex. 1D at 24.

Over the next ten years, CCA periodically modified the Plan in accordance with the reservation of rights clause in the Plan Termination section of the SPD. Though generally such changes entailed expansion of policy benefits, there were contractions also. R3-67 - Ex. 1 at 8; R3-67 - Ex. 2 at 4.

As was true of the original 1976 SPD, none of these subsequent SPDs specified any stated or set retiree premium amount or promised any particular allocation of cost or burden. On the contrary, for example, the 1986 SPD, in existence immediately before the changes at issue herein, provided:

> Who Pays for the Insurance - The Health Insurance under this Plan is on a contributory basis requiring contributions from you towards its cost.

R3-67 - Ex. 1F at 6. No retiree premium amount or "contribution" was specified. Further, it stated that:

> [t]he Employee's contribution is a fixed monthly rate as determined from time to time.

R3-67 - Ex. 1F at 29.

In addition, the Plan termination language from the 1976 SPD was carried over into each successive SPD. R3-67 - Ex. 1F at 30.

Commencing in 1977 or 1978, CCA provided annually to each of its active salaried employees a booklet entitled "Summary of Personal Benefits." R3-67 - Ex. 1G. The Summary of Personal Benefits booklet was a thirteen-page computer generated document that did *not* concern or describe the retiree medical benefits plan. Instead, it provided an individualized calculation of the pension and stock bonus plan accruals earned by the employee to date. It also made passing references to the dental, long-term disability insurance and life insurance plans, as well as Social Security, vacation time and paid holidays. *Id.*

The Summary of Personal Benefits booklet made a single reference to health insurance after retirement:

Event	**Health and Dental Plans**
You retire	Health insurance available to you and your dependents at a modest cost. Dental coverage ends.

R3-67 - Ex. 1G at 6. The booklet stated no other details about the Plan.

When a salaried employee neared his/her Normal Retirement Date under the pension plan (age 65) or requested an early retirement, CCA issued a standard form letter, accompanied by pension forms to be completed by the employee. R3-67 - Ex. 1 at 5-6. The letter advised the prospective retiree of a number of elections to be made and forms to be submitted in connection with retirement. Optional forms of pension payments needed to be selected. Life insurance could be converted. The employee was informed that the Stock Bonus Plan was distributable soon after retirement and was reminded that various active employee insurances ceased upon retirement. R5-106 - Ex. 10. The letter also advised the prospective retiree that he should apply for Medicare health care coverage one month before reaching age 65. The letter also quoted the then-current retiree premium charged for the CCA-offered retiree medical

or Medicare-supplemental coverage. For example, the letter sent to Petitioner Alday stated:

> A plan of health insurance benefits is available to you as a retiree through the company. The charge for this coverage for you is $20.00 per month, deductible from your monthly pension check.
>
> * * *
>
> [After age 65] [a] plan of health insurance benefits to supplement Medicare is also available through the company at a cost of $8.00 per month for you and $8.00 per month for your spouse.

R5-106 - Ex. 10; R3-54-8.

A copy of the current SPD for the retiree medical insurance plan accompanied by a retiree medical insurance enrollment card was sent to the prospective retiree shortly after this letter.[5] R3-67 - Ex. 1 at 5-6.

The enrollment card that was to be signed by the retiree and returned to the company provided for no particular premium contribution. Instead, it stated that employees would pay "the required contributions." R3-67 - Ex. 5H.

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5 Contrary to Petitioner's assertion (Petition at 22), the retiree health plan was not part of any employee benefits package held out to applicants or employees in consideration for their employment. Unlike the pension benefit which an employee accrues during his working life and, once vested, has a proprietary interest in, employees had no proprietary interest in or need to know about the medical insurance plan available for purchase upon retirement. Therefore, information about the plan was not given out to employees, unless specifically requested, until the time of their retirement. R7-107-52, 53, 56.

Beginning in 1985, a series of pre-retirement seminars was conducted for some CCA salaried employees nearing retirement. At these seminars, a set of visual projections was utilized and also copied and distributed to the seminar participants. R3-67-Ex. 1H. This handout included general information on retirement income, investment planning, benefits and income tax considerations. These documents did not specify a retiree medical premium amount, but stated only "Contribution Required." *Id.*

The cost of the CCA retiree medical insurance increased throughout the late 1970's and continued to escalate during the 1980's, as did the cost of health insurance nationally. R3-67 - Ex. 1C. At the same time, the number of CCA retirees was also increasing. R2-46 - Ex. 2.

By the mid-1980's, the cumulative weight of these increases began to command attention.[6] Moreover, the increases became more dramatic. Consequently, for example, between late 1983 and 1986, the cost of the CCA salaried under-65 retiree medical coverage increased 100% to $88.80 per month — it doubled in a little over two years. R3-67 - Ex. 1C.

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6 From 1977 to 1985, the total cost of the CCA under age 65 salaried retiree coverage jumped 327%, from $24.10 per month to $103.00 per month. The over age 65 costs likewise rose 260%, from $9.01 per month to $32.40 per month. R3-67 - Ex. 1C. Put differently, when CCA originally announced its retiree medical benefit plan in 1976, no particular percentage of cost was announced as payable by the retiree or the Company. Retirees at that time were, in fact, paying over 80 percent of the cost of coverage. By 1986, costs had risen to such an extent that the retirees were paying approximately only 20 percent. *Id.*

Effective January 1, 1987, Jefferson Smurfit Corporation ("JSC")[7] and CCA announced that they were placing all JSC and CCA active and retiree health insurance administration with Aetna, JSC's carrier for over 20 years, and that certain changes would be made to the insurance plans. R3-67 - Ex. 3 at 2-3. CCA salaried retirees were also advised that they, like JSC retirees,[8] would have to bear a greater share of the cost of the retiree medical insurance.[9]

SUMMARY OF THE ARGUMENT

The case at bar offers no special or important reason for a grant of the proposed writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. The decision of that court, and its reasons therefor, are highly fact specific. Contrary to Petitioner's contentions, it represents no divergence from the pronouncements of this Court, nor does it create any conflict with the decisions of other circuits.

The decision of this Court in *Firestone Tire & Rubber Co. v. Bruch*, __ U.S. __, 109 S.Ct. 948 (1989), simply does not

7 JSC purchased the stock of CCA in the latter part of 1986 in a joint venture with Morgan Stanley Leveraged Equity Fund, L.P.

8 At the time of the acquisition, unlike CCA, JSC's retirees were bearing a substantially greater share — in fact, in some cases, virtually *all* — of the cost of their medical insurance. In addition, hourly JSC retirees, except in a few cases, had no group health insurance even offered through the company at any cost. R3-67 - Ex. 3 at 2.

9 Specifically, all CCA and all post-1/1/87 JSC under 65 retirees were charged a premium of $56.21 for themselves and $92.45 for dependent coverage, while over 65 retirees were charged $54.81 and $54.81, respectively.

stand for the proposition for which Petitioner offers it. Petitioner contends that *Bruch* mandates a federal common law whereunder welfare benefit plans applicable to retirees should be considered vested because, allegedly, pre-ERISA state common law provided as much.

This argument fails in two respects. First, pre-ERISA common law did not uniformly so hold.

Second, and of greater importance, regardless of what the common law held, Congress deliberately and purposefully made clear that, under the "comprehensive and reticulated" statutory scheme of ERISA, welfare benefit plans, unlike pension benefit plans, are not considered vested unless the benefit plan so provides by its terms.

As for Petitioner's other basis for his petition, no federal court of appeals has held that promissory estoppel, through alleged oral representations or informal writings, can operate to amend the terms of an *unambiguous* employee benefit plan. Such plan documents are expressly required by ERISA and are to be created and maintained in writing and modified *only* by formal written amendment of their terms in accordance with applicable federal statutory prescriptions.

The Eleventh and other circuits have permitted claims of promissory or equitable estoppel in cases of fraud or where unclear or ambiguous plan provisions have been the subject of interpretations or promises by persons in authority to participants, who, in turn, relied thereon to their detriment. No such facts are pleaded or presented in this case. The district court and the court of appeals both found the CCA retireee medical benefit plan to be explicit and unambiguous in its reservation of right "to terminate suspend, withdraw, amend or modify the Plan in whole or in part at any time..."

In any event, both courts below also found, in the alternative, that, even if promissory estoppel was available under the

facts in this case, Petitioner had failed to state a claim therefor. Therefore, Petitioner's arguments on this issue are moot.

ARGUMENT

I. THIS COURT'S DECISION IN *FIRESTONE TIRE & RUBBER CO.v. BRUCH* HAS NO BEARING ON THE ISSUES PRESENTED IN THIS CASE, AND, THUS, PROVIDES NO BASIS BY WHICH TO INVOKE THE COURT'S DISCRETIONARY REVIEW

Retiree medical insurance plans, such as the one at issue here, are welfare benefit plans covered by ERISA. 29 U.S.C. § 1002(1). Unlike pension plans, however, welfare benefit plans are not covered by ERISA's vesting, minimum funding, and benefit accrual requirements. It is quite clear, moreover, that the omission of any vesting requirements for welfare benefit plans reflected a conscious, deliberate policy choice by Congress, necessitated by the differences between pension plans and welfare plans in terms of how they are funded by the employer and the functions which they serve. *See, e.g.*, H.R. Rep. No. 807, 93d Cong., 2d Sess. 15, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4670, 4726; S. Rep. No. 383, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 4935. *See also Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1160 (3d Cir. 1990).

As this Court has observed, judicial intervention to infer a vested right in a welfare plan has been recognized as particularly inappropriate when viewed in the context of a "comprehensive and reticulated" statute such as ERISA. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980); *see also Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134,146-47 (1985); *Van Orman v. American Ins. Co.*, 680 F.2d 301, 312 (3d Cir. 1982).

The congressional judgment to date to require the vesting of pension but not welfare benefits reflects "a finely tuned

balance between protecting pension benefits for employees while limiting the cost to employers." *A-T-O, Inc. v. Pension Benefit Guaranty Corp.*, 634 F.2d 1013, 1021 (6th Cir. 1980) (citations omitted); *accord Hozier*, 908 F.2d at 1160.[10]

Case law following the enactment of ERISA has recognized the distinction between welfare benefit plans and pension plans, and confirmed that an employee "can never accrue 'vested' rights to ... [welfare benefit plan] benefits under ERISA." *See Anderson v. Alpha Portland Indus.*, 836 F.2d 1512, 1516 (8th Cir. 1988); *accord Massachusetts v. Morash*, ___ U.S. ___, 109 S. Ct. 1668, 1675 (1989); *Hozier*, 908 F.2d 1155 (3d Cir. 1990); *Ryan v. Chromalloy American Corp.*, 877 F.2d 598, 603 (7th Cir. 1989); *Musto v. American Gen. Corp.*, 861 F.2d 897, 901 n.2 (6th Cir. 1988), *cert. denied*, 109 S.Ct. 1745 (1989); *Moore v. Metropolitan Life Ins. Co.*, 865 F.2d 488, 492 (2d Cir. 1988).

Accordingly, any retiree right to lifetime medical benefits can only be found if it is expressly established by contract under the terms of the ERISA-governed benefit plan document. *See, e.g., Moore*, 856 F.2d at 492; *Anderson v. John Morrell & Co.*, 830 F.2d 872, 876 (8th Cir. 1987); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 612-15 (6th Cir. 1985), *cert. denied*,

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10 The need to take into account the burden on employers reflected not only the extreme expense involved in requiring vesting but also Congress' recognition that imposition of "overly burdensome" costs would be "self-defeating," since employers would respond by electing not to offer such plans at all. 120 Cong. Rec. 8702, *reprinted in*, 1974 U.S. Code Cong. & Admin. News 5166 (remarks of Rep. Al Ullman); *see also*, H.R. Rep. No. 807, 93d Cong., 2d Sess. 15, *reprinted in*, 1974 U.S. Code Cong. & Admin. News 4670, 4682.

475 U.S. 1017 (1986); *UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1479-83 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984).

In light of Congress' intent that ERISA fully occupy the field of employee benefit plans, *see Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981), its deliberate reluctance to impose the vesting of medical benefit plans on employers, and the compelling reasons therefor, in addition to Congress' continuing study of the issue, no court should lightly infer the existence of a contractual obligation to this effect, absent a clear and definite statement of such a contractual undertaking. *See Hozier*, 908 F.2d at 1162; *Alpha Portland*, 836 F.2d at 1516-17.

Petitioner attempts an "end run" around this line of authority. He enlists *Firestone Tire and Rubber Co. v. Bruch*, __ U.S. __, 109 S.Ct. 948 (1989) ("*Bruch*"), to do his blocking and open the way for a return to what Petitioner claims was the pre-ERISA common law on vesting of retiree health benefits. Yet, in this case, *Bruch* is not even suited up to play.

The *Bruch* decision concerned only the judicial standard of review under section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), applicable to a fiduciary's decision to deny a plan participant's request for a severance benefit. *See Bruch*, 109 S. Ct. at 953. In that case, this Court held that generally a *de novo* standard of review is to be applied to such a decision. This Court emphasized that its holding "is limited to the appropriate standard of review in § 1132(a)(1)(B) actions challenging denials of benefits based on plan interpretations." 109 S. Ct. at 953.[11]

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11 This case raises no issue with regard to the denial of benefits or the administration of a benefit plan, much less Respondents' role as fiduciaries in interpreting and applying plan terms. Here, the issues concern only Respondents' actions in modifying the terms

Nothing in *Bruch* can be read to signal the abandonment of the established distinction between an employer's role as fiduciary in the administration of a plan and an employer's role as settlor of such plans when making business decisions as to what benefits to provide.

Ultimately, Petitioner proffers *Bruch* for the truly revolutionary proposition that Congress meant to establish pre-ERISA common law as a substantive floor for federal courts in interpreting and applying ERISA. Petitioner attempts to show that had his claims arisen prior to ERISA's enactment, he "would have been entitled to recover" because pre-ERISA law "held that the right to such health insurance retiree benefits was a vested right once the employee retired." Petition at 22.

This position is fatally flawed in at least two respects: 1) no reading of *Bruch* suggests a return to pre-ERISA common law; and 2) even under pre-ERISA law, Petitioner would not have been entitled to recover on his claims based upon the undisputed facts of this case.

Petitioner appears to hinge the proposition that pre-ERISA law should control here on the *Bruch* opinion's choice of the

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of the retiree medical insurance plan, *not* the administration of that plan. Virtually every circuit has held that an employer's decision to terminate one plan of benefits and substitute another less favorable plan and related decisions regarding plan design are *not* subject to review under the fiduciary standards of ERISA. *See, e.g., Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1161 (3d Cir. 1990) (and cases cited therein).

Nothing in *Bruch* can be read to signal the abandonment of the established distinction between an employer's role as fiduciary in the administration of a plan and an employer's role as settlor of such plans when making business decisions as to what benefits to provide.

pre-ERISA common trust law standard of *de novo* review where ERISA does not set its own standard of review for actions under Section 502(a)(1)(B) challenging benefit eligibility determinations. In so holding, the opinion made the observation that adoption of Firestone's reading of ERISA would require imposition of a standard of review that would afford less protection than employees enjoyed before ERISA was enacted. 109 S.Ct. at 956.

This observation, however, while worthy of consideration where ERISA is mute, does *not* state that such a result is impermissible under ERISA as a matter of congressional intent. This is particularly true where, as here, ERISA clearly establishes a statutory scheme different from the common law; health and welfare benefit plans, *unlike* pension plans, were *not* to be considered vested benefits. *See* 29 U.S.C. § 1051(1). *See also* 1974 U.S. Code Cong & Admin. News 4670, 4726; *Massachusetts v. Morash*, ____ U.S. ____, 109 S.Ct. 1668, 1675 (1989); *Howe v. Varity Corp.*, 896 F.2d 1107, 1109 (8th Cir. 1990). In this regard, as demonstrated herein, ERISA has most assuredly occupied the field, thereby displacing any contrary common law. *See In re White Farm Equipment Co.*, 788 F.2d 1186, 1192 (6th Cir. 1986) (criticizing lower court's reliance on pre-ERISA common law cases concerning benefits termination, which are superseded by ERISA"); *accord Anderson v. John Morrell & Co.*, 830 F.2d at 875.

Moreover, even were pre-ERISA common law to be applied here, it is not at all clear that Petitioner would have been entitled to recover. *See* Petition at 17-22. All the cases cited by Petitioner, with one exception, involve accrued pensions, *not* health or other welfare beenfits. A single Ohio case, *Sheehy v. Selion, Inc.*, 227 N.E. 2d 229 (Ohio 1967), does not fix pre-ERISA law as some uniform, constant object in the legal firmanent.

Pre-ERISA common law was not even clearly settled on the vesting issue in the case of pension plans. For instance, in *Boase v. Lee Rubber & Tire Corp.*, 437 F.2d 527, 532-34 (3d Cir. 1970), the court rejected the plaintiffs' claim for pension benefits as vested under an estoppel theory and, instead, enforced the clear, written terms of the pension plan which preserved the employer's right to modify or terminate the plan at any time, *despite* the existence of ancillary documents distributed to employees, supplemented by oral representations by company officers, that the pensions were payable for life. Here, there is *no* dispute that the Plan documents unambiguously reserved the right to CCA to change, modify or terminate the Plan at anytime, and Petitioner cannot point to a single ancillary document that even implies that retiree health insurance was payable for life.

The other pre-ERISA cases that Petitioner selectively offers as supporting his claim for recovery are at best inapposite. In *Rochester Corp. v. Rochester*, 450 F.2d 118 (4th Cir. 1971), the terms of the pension plan expressly gave employees a vested right after ten years' service and the plan did not reserve any right to modify or terminate -- unlike the welfare plan in this case. In *Hoefel v. Atlas Tack Corp.*, 581 F.2d 1 (1st Cir. 1978), another *pension* case, the court refused to give effect to a reservation of rights provision *because* it was ambiguous — again, unlike the undisputed facts, here.

Bruch just can not be read to stand for the proposition that wherever pre-ERISA case law once *might* have afforded plan participants greater protection, federal courts should intervene and systematically dismantle "ERISA's interlocking, interrelated and interdependent remedial scheme" in order to achieve whatever result favors the plan participants. *See Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. at 146. Consequently, this Court's decision in *Bruch* does not suggest any reason why

this Court should grant a writ of certiorari on this basis in this case.

II. THERE IS NO SPLIT IN THE CIRCUIT COURTS OF APPEAL REGARDING THE UNAVAILABILITY OF PROMISSORY ESTOPPEL UNDER ERISA TO ALTER THE TERMS OF AN UNAMBIGOUS ERISA PLAN DOCUMENT

Contrary to Petitioner's assertion, the federal courts of appeal are not split on the unavailability of promissory estoppel under ERISA in the common situation presented by the instant case. Other courts have followed the lead of the Eleventh Circuit in *Nachwalter v. Christie*, 805 F.2d 956 (11th Cir. 1986), in this regard. Virtually all courts that have directly considered the issue raised before the Eleventh Circuit in both *Nachwalter* and the instant case have agreed that there is no federal common law right to promissory estoppel under ERISA in cases involving alleged oral or informal written amendments to or modification of the unambiguous terms of employee welfare benefit plans governed by ERISA. This is because ERISA specifically regulates these situations by requiring that such plans be created, maintained and amended only in writing through ERISA-mandated and specified plan documents. *Nachwalter*, 805 F.2d at 960; *Alday*, 906 F.2d at 666.

In this regard, the *Nachwalter* decision has now been cited with approval by, and followed in cases of, the Fifth, Sixth, Second and Tenth Circuits. *See Cefalu v. B. F. Goodrich Co.*, 871 F.2d 1290, 1295-97 (5th Cir. 1989); *Musto v. Amer. Gen. Corp.*, 861 F.2d 897, 910 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1745 (1989); *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2nd Cir. 1988); *Straub v. Western Union Telegraph Co.*, 851 F.2d 1262, 1265 (10th Cir. 1988) ("Following the lead of the Eleventh Circuit, we hold that no liability exists under

ERISA for purported oral modifications of the term of an employee benefit plan.").

In *Nachwalter*, a plan participant sought to establish an alleged oral modification to the terms of an ERISA pension plan and asked the court to estop the trustees from enforcing written terms contrary to rather explicit alleged oral representations. The Eleventh Circuit declined:

> A federal court may create federal common law based on a federal statute's preemption of an area only where the federal statute does not expressly address the issue . . .
>
> . . . ERISA expressly requires that employee benefit plans be "established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). We agree with the district court that this requirement that ERISA plans be "maintained" in writing precludes oral modifications of the Plans; *the common law doctrine of estoppel cannot be used to alter that result.*

Nachwalter, 805 F.2d at 959-60 (citations omitted) (emphasis added). Though the alleged contrary representation at issue in *Nachwalter* was oral, the court also made clear that it understood Congress to have "expressly prohibited informal written amendments of ERISA plans." *Nachwalter*, 805 F.2d at 960. *Accord Cefalu v. B. F Goodrich Co.*, 871 F.2d at 1296-97.

In a retiree health insurance case which is factually very close to the instant lawsuit, a similar conclusion was reached by the Second Circuit in *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488 (2d Cir. 1988). The plaintiffs in *Moore*, apparently quite similarly to Petitioner Alday, were "driven to argue that the 'contract' between themselves and Metropolitan consists of

the totality of the representations made to the employees by the Company . . . ." *Id.* at 491.[12]

In rejecting plaintiff's reliance thereon, the court noted:

> Congress intended that plan documents and the SPDs exclusively govern an employer's obligations under ERISA plans. This intention was based on a sound rationale. *Were all communications between an employer and plan beneficiaries to be considered along with the SPDs as establishing the terms of a welfare plan, the plan documents and the SPDs would establish merely a floor for an employer's future obligations. Predictability as to the extent of future obligations would be lost, and consequently, substantial disincentives for even offering such plans would be created.*

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12 In *Moore*, Metropolitan maintained health insurance for its employees and later retirees for over seventy years. In 1984 and 1985, Metropolitan significantly raised the deductibles by more than 300% to $24 per person/$48 per family. Several Metropolitan group insurance booklets expressly reserved "the right at any time to change or discontinue" the plan. *Moore*, 856 F.2d at 490. Plaintiffs complained, however, that Metropolitan's communication programs, film strips and other benefit promotion materials, memoranda and letters did not mention this right of amendment. Moreover, these materials and presentations occasionally described the insurance and retirement benefits as "lifetime" or "at no cost." *Id.*

856 F.2d at 492 (*citing Nachwalter*, 805 F.2d at 960; other citations omitted) (emphasis added).[13]

Petitioner here concedes that these courts have squarely rejected the argument that promissory estoppel is available under ERISA to alter the terms of an unambiguous plan. Petition at 29-30. However, he asserts that other circuits have issued contrary holdings in an attempt to get this Court to grant

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13 Similarly, in *Musto*, also factually very close to this case, following a corporate acquisition, the successor employer changed the terms of the retiree medical insurance plan to require participants to contribute 50 percent of the total cost, instead of the old plan's requirement of 20 to 25 percent. Despite the existence of unambiguous plan language reserving the right to change or terminate the plan, plaintiffs argued that alleged oral representations to the contrary estopped the employer from relying on the reservation of rights language.

The Sixth Circuit rejected the plaintiffs' claim based upon alleged oral representations to prospective retirees that no changes would be made in the retiree medical insurance, stating:

> [W]e are quite certain that Congress, in passing ERISA, did not intend that participants in employee benefit plans should be left to the uncertainties of oral communications, in finding out precisely what rights they were given under the plan. That is why ERISA makes it mandatory that every plan be established and maintained under a "written instrument." 29 U.S.C. § 1102(a)(1).
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> * * *
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> . . . Other courts that have considered this Congressional policy have concluded that the clear terms of a written employee benefit plan may not be modified or superseded by oral undertakings on the part of the employer.

Musto, 861 F.2d at 909-10.

certiorari. However, the cases Petitioner cites on this issue simply do not support his assertion.

No issue of promissory estoppel was even presented in *Woodfork v. Marine Cooks and Stewards Union*, 642 F.2d 966 (5th Cir. 1981). Furthermore, as noted above, the same Fifth Circuit, in a much more recent case when it *did* address this issue, held that promissory estoppel is not generally available under ERISA. *Cefalu*, 871 F.2d at 1295-97. Petitioner also cites a number of decisions in the Sixth Circuit, *O'Grady v. Firestone Tire & Rubber Co.*, 635 F. Supp 81 (S.D. Ohio 1986), *International Union UAW v. Cadillac Malleable Iron Co.*, 728 F.2d 807 (6th Cir. 1984), and *UAW v. Park-Ohio Industries, Inc.*, 661 F. Supp. 1281 (N.D. Ohio 1987), among others, in support of his argument. However, without addressing the merits of his assertions regarding the holdings of these cases, Petitioner again ignores the fact that the Sixth Circuit's only specific consideration of the issue explicitly *rejected* Petitioner's promissory estoppel theory. *Musto*, 861 F.2d at 909-10.

Petitioner also cites a number of Labor Management Relations Act cases - cases which were not even brought under ERISA — in support of his argument. These decisions have no bearing on this issue as they interpret a completely different statutory scheme and frequently concern themselves with discerning the intent of the two parties to union contracts.

It is important to recognize here what Petitioner is requesting of this Court. The decisions discussed by Respondents above all stand for the proper conclusion that under ERISA an *unambiguous* employee benefit plan may not be *amended* by informal written or oral statements. ERISA's provisions are clear that these plans are to be developed, maintained and amended in writing in accordance with the terms of the plan. Promissory estoppel was denied here, as in *Musto* and *Moore supra*, because the alleged promises, which Petitioner sought to

assert, were directly contrary to the CCA plan. To hold otherwise would grievously undermine ERISA's statutory scheme.

To be sure, this precedent does *not* mean that promissory estoppel is unavailable in *all* circumstances under ERISA. Thus, for example, the Eleventh Circuit consistently has recognized that equitable promissory estoppel may be asserted in cases of intentional fraud or where specific contrary representations have been made to an employee concerning the interpretation of a plan which is ambiguous such that a reasonable person could disagree as to the plans' terms meaning or effect. *Alday*, 906 F.2d at 666; *Kane v. Aetna Life Ins.*, 893 F.2d 1283, 1285-86 (11th Cir. 1990). Likewise, other circuits have recognized the availability of promissory estoppel where specific representations were made about collateral matters, other than plan terms, upon which the employee reasonably relied to his detriment. *See, e.g., Black v. TIC Investment Corp.*, 900 F.2d 112 (7th Cir. 1990).[14]

Here, however, as the court of appeals noted, the plan documents were unambiguous in reserving to CCA the right to amend or terminate the plan, and no misrepresentation contrary to the plan provisions was ever allegedly made. Instead, Alday was complaining that collateral documents upon which he claimed to rely merely failed to include all the plan's language concerning CCA's right to modify or terminate the plan. Thus, simply put, Alday sought to edit out key unambiguous

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14 *Black v. TIC Investment Corp.*, 900 F.2d 112 (7th Cir. 1990), involved an employment termination notice directed to plaintiff Black advising him that over $18,000 in severance pay benefits "will be due and payable to you if and when the [bankruptcy courts] approve such payments." *Id.* at 113. Thereafter, defendant filed an objection in the bankruptcy court to the claim for severance on the ground that such welfare plans could be unilaterally terminated. The court found the specific promise of payment subject to court approval, upon which the plaintiff had

provisions of the plan because they were not contained in all documents and did not comport with his understanding.

III. EVEN IF PROMISSORY ESTOPPEL WERE AVAILABLE, THE COURTS BELOW PROPERLY HELD THAT PETITIONER ALDAY FAILED TO STATE A CLAIM FOR PROMISSORY ESTOPPEL

Even if ERISA common law were construed to permit effective plan modification under a promissory estoppel theory, Petitioner Alday was found by the district court not to state a claim therefor. The court found, in the alternative, that "these statements would not alter its determination as to defendant's obligation under the plan." *Alday*, No. 87-488-Civ-J-16, slip. op. at 17 n.1. (M.D. Fla. May 22, 1989). Similarly, the court of appeals observed that "none of the documents relied on by Alday in any way contradict the SPD." *Alday*, 906 F.2d at 666 n.15.

The prerequisites for recovery under the general common law doctrine of promissory estoppel are:

> (1) a clear and definite agreement, (2) proof that the party seeking to enforce the agreement reasonably relied upon it to his detriment, and (3) a finding that the equities support enforcement of the agreement.

Jungmann v. St. Regis Paper Co., 682 F.2d 195, 197 (8th Cir. 1982) (per curiam) (citations omitted). *See also Litman v. Massachusetts Mut. Life Ins. Co.*, 739 F.2d 1549, 1559 n.7 (11th Cir. 1984); *Santoni v. Federal Deposit Ins. Corp.*, 677 F.2d 174, 179 (1st Cir. 1982). In this case, the documents at issue as well

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relied to his detriment, binding. *Id.* at 116. It should be noted that while *Black* can be read to recognize a general availability of promissory estoppel under ERISA, under the facts and circumstances of that case, there is no disagreement between the circuits.

as Mr. Alday's own testimony simply did not establish these elements.[15]

Mr. Alday himself had no "understanding" or reliance at all about retiree medical insurance based on the form letter and other collateral materials cited, let alone an understanding sup-

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15 Here, Petitioner primarily relied upon one of the standard pre-retirement form letters which quoted current retiree health insurance contribution charges at $20 and $8. The form letter, however, did *not* say that insurance at tht cost would "perpetually" be available, was "vested" or never could or would go up.

The subject letter made no representation whatsoever about what the benefits and costs *would be*, let alone a clear and unambiguous promise. It merely recited what "*is*" the cost and what "*is* available." In short, it made no promise contrary to the Plan's explicit provisions concerning termination and modification. It offered no assurance contrary to CCA's statement when the Plan was initiated that premiums "may change in the future." *Accord, Petersen v. Grand Trunk Western R.R. Co.*, 683 F. Supp. 649, 651 (E.D. Mich. 1988)

Mr. Alday conceded that he understood as much when questioned about the retirement letter in his deposition:

Q. Is there any way, in that document, to your understanding, that you're promised that that cost might not go up in the future?

A. No. Nor is there anything in there that says it will.

* * *

Q. And you can't testify that this $8 or $20 can never change, the benefits can never change?

A. No.

R5-107-73, 80.

posedly common to the other 1000 salaried retirees.[16] On the contrary, Alday repeatedly conceded that he recognized that CCA could alter the plan and increase his premiums. R-5-107-47, 51, 80-82. No element of promissory estoppel is made out by his claim.

CONCLUSION

For all the foregoing reasons, the Petition does not state a basis upon which a proposed writ of certiorari should be granted. Respondents respectfully request that the Petition be denied.

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16 In addition, unlike *Black v. TIC Investment Corp.*, 900 F.2d 112 (7th Cir. 1990), there is absolutely no evidence of detrimental reliance in this case, let alone evidence indicating that such reliance — even if it could be established — could be found "reasonable," given the plain language of the plan documents discussed above. *See Etherington v. Bankers Life & Casualty Co.*, No. 88 C 10963 (N.D. Ill. Aug. 29, 1990) (LEXIS, Genfed library, Newer file) (*construing Black*).